Petition

81-1951

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE VESSEL HOEGH SHIELD,
etc., et al.,
Petitioners,

v.

GULF TRADING & TRANSPORTATION COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review herein are as follows:

1. Did the District Court and the Fifth Circuit Court of Appeals err in upholding and/or avoiding the issue of the constitutionality of the prehearing, prejudgment seizure, posting of security, and procedures of Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims (the "Admiralty Rules") and Rules 4 and 9(h) of Federal Rules of Civil Procedure?

Petitioners answer "yes."

2. Did the District Court and the Fifth Circuit Court of Appeals err in finding a maritime lien through the use of the substantive law of the United States rather than of Great Britain in this case?

Petitioners answer "yes."

CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record, certifies that the following listed persons or entities have an interest in the outcome of this case of which I am aware.

1. Gulf Oil Corporation of which Gulf Trading Company is an unincorporated division. The principal subsidiaries of Gulf Oil Corporation are:
   Gulf Refining Company
   Kewanee Industries, Inc.
   The Pittsburg & Midway Coal Mining Co.
   Transocean Gulf Oil Company
   Afran Transport Company
   Gulf Kuwait Company
   Gulf Canada Limited
   Gulf Oil (Nigeria) Limited
   Gulf Oil (Great Britain) Limited
   Gulf Oil (Nederland) B.V.
   Gulf Oil Raffinaderij B.V.
   Gulf Oil (Switzerland)
   Gulf Oil Trading Co., Limited
   Kupan International Company
   Gulf Italiana S.p.A.
   Midcaribbean Investments Limited
   Caribbean Gulf Refining Corporation
   Gulf Petroleum S.A.
   Svenska Gulf Oil Aktiebolag
   Bulk Petroleum Corporation
   Cabinda Gulf Oil Company
2. A/S Alliance
3. Nordisk Skibsrederforening

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in 658 F.2d 363 (CA5, Oct. 7, 1981). The text of the opinion appears in the Appendix.

The opinion of the United States District Court for the Southern District of Texas on the threshold issues of the case as rendered by the Honorable Allen B. Hannay, United States Senior District Judge, on March 26, 1980, is quoted verbatim in the Appendix, along with Judge Hannay's final opinion filed on August 12, 1980.

JURISDICTION

The jurisdiction of the District Court to hear this case was based on 28 United States Code, Section 1333, and Article III, Section 2, of the Constitution of the United States.

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GULF TRADING & TRANSPORTATION COMPANY,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

STATEMENT OF THE CASE

This case presented to the United States Court of Appeals for the Fifth Circuit the issue as to the constitutionality of Admiralty Rules C and E concerning *in rem* seizure, and posting security for a vessel without a pre-

liminary judicial hearing. It was heard for oral argument at the same time as the case of *The Dredge General G. L. Gillespie, etc., et al. v. The Merchants National Bank of Mobile, et al.*, 663 F.2d 1338 (CA5, Dec. 18, 1981) which case is also petitioning for review of this Court and, which this Petition joins in seeking a review of the constitutionality of the Admiralty Rules. These two cases were the first that have been presented to any United States Court of Appeals concerning the constitutionality of Admiralty Rules. After the Fifth Circuit opinion in this case but before their opinion in *The Dredge General G. L. Gillespie, supra,* the Fourth Circuit issued its opinion in the case of *Amstar Corporation v. S/S Alexandros T.*, 664 F.2d 904 (CA4, Nov. 10, 1981) which Circuit held that Admiralty Rule C satisfied the minimum requirements of the due process clause of the Constitution of the United States in which opinion the Fifth Circuit concurred, thus this Petition For Certiorari.

The United States Court of Appeals for the Fifth Circuit held in the opinion below that United States maritime lien law always applies when an American supplies a foreign flag vessel in American waters, regardless of the circumstances of an international transaction. This holding is contrary to the direction of the United States Supreme Court in *Lauritzen v. Larson,* 345 U.S. 371, 73 S.Ct. 921, 97 L.Ed. 1254, (1953); and *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 1912, 32 L.Ed. 513 (1972), thus again, this Petition for Certiorari.

This case was presented to the District Court for decision based on stipulations, depositions and briefs. The Norwegian flag vessel HOEGH SHIELD was under

charter by the Liberian corporation, Multinational, with its principal office in London, England. Multinational chartered many vessels. When these vessels needed fuel for their chartered travels around the world for Multinational, Multinational frequently contracted with plaintiff, Gulf, in London for its fuel needs. In this case Multinational, in London, again approached Gulf's London office for its fuel requirements for the HOEGH SHIELD. The agreement was reached in London, England that fuel would again be provided by Gulf on Multinational's request. The fuel was provided at the chartered ship's next stop, which was in the Panama Canal Zone, a United States jurisdiction at the time. The HOEGH SHIELD, after picking up the fuel, did not stay at the Panama Canal Zone. It left immediately back into Multinational's international commerce.

Gulf later attempted to obtain payment from Multinational for the fuel, but Multinational went bankrupt. Thereafter the HOEGH SHIELD arrived in Houston, Texas.

The same day a seizure warrant for the ship was sought by Gulf, and issued by the United States District Clerk pursuant to Admiralty Rules C and E. No prior notice of the seizure warrant was given to the ship's owners before it was issued by the District Clerk. No prior judicial participation or hearing occurred before the seizure warrant of the HOEGH SHIELD was issued.

Informed that the writ of seizure was issued and that the U.S. Marshal was going to seize the ship, its owners posted security pursuant to Admiralty Rule E with the Plaintiff.

ARGUMENT

I. The Prehearing, Prejudgment Seizure and Security Provisions Of The Admiralty Rules Are Unconstitutional.

A. Introduction

The Supplemental Rules For Certain Admiralty and Maritime Claims provide for the seizure of property and posting of security in lieu of property prior to any judicial hearing or judgment. Prejudgment seizures are provided for in Admiralty Rule C(3), while posting security in lieu of the vessel is provided for in Admiralty Rule E(5).

Generally, prejudgment seizures or other deprivations of property are suspect. It is only in certain narrow situations, surrounded by substantial procedural protections, that they are allowed at all. The Admiralty Rules provide no such procedural protections and, as will be shown in greater detail, the prejudgment, prehearing seizure and security provisions are unconstitutional under the Fifth Amendment of the United States Constitution. As a consequence, the district court's decision below upholding the constitutionality of Rules C and E as erroneous and should be reversed.

B. Courts Dealing With The Constitutionality Of The Admiralty Rules—A Split In Authority

To date, several district courts have ruled directly upon the constitutionality of the prejudgment seizure procedures of the Admiralty Rules. Four district courts have found the procedures to be unconstitutional, while seven others have found them to be constitutional.

In the most recent decision prior to the district court's decision below, the court found that the prejudgment seizure procedures of Rule C were unconstitutional. *Karl Senner, Inc. v. The M/V Acadian Valor,* 485 F.Supp. 287, 1980 A.M.C. 1 CAS. Judge Arceneaux's opinion in *Karl Senner* clearly constitutes the most thorough and scholarly treatment of the constitutional issues to date. Petitioners are advised that the *Senner* case was settled prior to the hearing on appeal to the Fifth Circuit.

The district court in *P. C. International, Inc. v. Vessel Susan,* 1980 A.M.C. 2062 (S.D. Fla. May 7, 1980) held Rule C in violation of the Supreme Court's requirements for constitutional due process in *Fuentes v. Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972). The district court in *Alyeska Pipeline Service Co. v. The Bay Ridge,* Civ. No. 80-147 (D. Alaska, March 16, 1981) also held Admiralty Rule C unconstitutional for the same reasons.

In addition, two courts have recently held Admiralty Rule B's prejudgment attachment provision to be unconstitutional because it did not provide the procedural safeguards necessary to justify a prejudgment seizure. *Grand Bahama Petroleum Co., Ltd. v. Canadian Transportation Agencies, Ltd.,* 450 F.Supp. 447, 458 (W.D. Wash. 1978), *Cook Industries, Inc. v. Tokyo Marine Company Limited,* 1978 A.M.C. 1979 (D. Alaska 1978). Rule B is substantially the same as Rule C, which provides for the seizure involved in this case. Rules B and C have the same basic purpose, and the identical procedures apply to both of these prejudgment seizures. Accordingly, the analyses and holdings in *Grand Bahama* and *Cook Industries* are directly applicable to the instant case.*

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* As *Grand Bahama* correctly points out, a lower court can declare a Supreme Court Rule unconstitutional. 450 F.Supp. at 449-51.

On the other hand, the court below and several other courts, including the court below in *The Dredge General G. L. Gillespie, supra,* case, have held that the Admiralty Rules' prejudgment seizure provisions are constitutional. *Anti Costi Shipping Corp. v. Golar Martins,* 78 Civ. 4421 (S.D.N.Y. 1979) (dealing with Rule B); *A/S Hjalmar Bjorges Rederri, et al. v. The Tugboat Condor,* Civ. No. 79-131-E (S.D. Cal. 1979) ("CONDOR Mem. Dec."); *Stoner v. Oil Screw NEISKA II,* 1978 A.M.C. 2650 (D. Alaska 1978); *Bethlehem Steel Corporation v. S/T. VALIANT KING,* 1977 A.M.C. 1719 (E.D. Pa. 1974) and *Central Soya Co. v. Cox Towing Corp.,* 417 F.Supp. 658 (N.D. Miss. 1976) (all dealing with Rule C). Thus, in direct holdings, there is a split of authority among the various district courts.

Of the cases cited above, the most thorough and reasoned analyses were made in *Karl Senner, Susan, Bay Ridge,* and *Grand Bahama.* The cases upholding constitutionality either beg the question with only the briefest attempts at rationalizing the decision, or perfunctorily dismiss the constitutional challenges as frivolous. Yet, as will be shown in the succeeding sections of this petition, the conclusion that the prejudgment, prehearing seizure provisions of the Admiralty Rules as written and applied are unconstitutional (and thus the related posting of security provisions of Rule E) is both consistent with and, indeed, mandated by the series of Supreme Court cases which have set the constitutionality guidelines for prejudgment deprivation of property. *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972); *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 40 L.Ed.2d 406 (1974); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601, 42 L.Ed.2d 757 (1975).

C. The Admiralty Rules Are Unconstitutional Under The Supreme Court Cases

The *Sniadach—Fuentes—Mitchell—North Georgia* line of cases has set forth two rules to be applied in testing the constitutionality of prejudgment seizures of property. The general rule applies in cases where the interest advanced by the prejudgment seizure is the private interest of a creditor seeking to be paid. On the other hand, in "exceptional situations" involving a general public or governmental interest, a special rule is applied. Under both of these tests, the Admiralty Rules' prejudgment seizure and sale provisions are unconstitutional.*

1. Unconstitutionality Under The General Rule

The four Supreme Court cases have contributed to the development of a general test regarding the constitutionality of prejudgment deprivations of property. First, *Sniadach* held invalid a procedure providing for the prejudgment garnishment of wages. Next, *Fuentes* put to rest any thought that this rule applied only to the deprivation of "necessities" such as wages, and held that the prejudgment deprivation of any property could be unconstitutional. *Fuentes* gave rise to the thought that the Supreme Court has created a *per se* rule rendering invalid all prejudgment seizures.

In *Mitchell,* however, the Court held that a balancing test is to be applied, balancing the interest of the creditor

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* The Admiralty Rules were promulgated in 1966, prior to *Sniadach* which was the first of these Supreme Court cases dealing with prejudgment deprivations of property. Accordingly, the constitutional principles developed in these cases were not considered in promulgating the Admiralty Rules.

with that of affording the debtor due process protections. The Court held that the proper balance was struck in the particular statute in question, and held that statute constitutional. The Court relied on five procedural protections afforded to the defendant by the challenged statute:

(a) The requirement that the plaintiff file a verified affidavit which specifically and factually stated the nature of the claim, the amount of the claim and the grounds relied upon for an issuance of a writ of attachment. 416 U.S. at 605, 40 L.Ed.2d at 412.

(b) The requirement that a bond be posted by the creditor before the writ will issue. *Id.* at 606, 40 L.Ed.2d at 412.

(c) The requirement that a clear showing be made to a judicial officer that there is a factual basis for the issuance of the writ. *Id.*

(d) The availability of an immediate post-seizure procedure to dissolve the writ, which dissolution must be ordered if the creditor does not prove the grounds upon which the writ was issued. *Id.* at 606, 40 L.Ed.2d at 413.

(e) The availability of an optional process by which a debtor may regain possession of the attached property by filing his own bond. *Id.* at 607, 40 L.Ed.2d at 413.

There was a suggestion by some critics of *Mitchell* that it had overruled *Fuentes* and *Sniadach*. *See, e.g.*, Justice Stewart's dissent. 416 U.S. at 635, 40 L.Ed.2d at 429. However, that fear turned out to be unjustified by reason of the Court's decision in *North Georgia*.

In *North Georgia,* the Court was faced with a pre-judgment non-wage garnishment statute which did not provide three of the five *Mitchell* protections. The Court held that statute unconstitutional, relying on the fact that the seizure could be initiated (a) on the basis of a conclusory affidavit, (b) without judicial participation, and (c) without the opportunity for an immediate post-seizure hearing for the creditor to prove at least probable cause for the garnishment. 419 U.S. at 607, 42 L.Ed.2d at 757. The statute was unconstitutional even though it required the creditor to post a bond and provided that the debtor would obtain release of the garnished property by filing his own bond.

Thus, the general rule developed by the Supreme Court in these cases is that there is a balancing test to be applied. The creditor's interest in recovering his money is to be balanced against the procedural protections afforded the debtor. Where all five protections of *Mitchell* are present, the statute is constitutional. On the other hand, where the protections requiring a specific factual affidavit, judicial participation in the seizure and an immediate post-seizure hearing are missing, the statute is unconstitutional. Indeed, in the Fifth Circuit, the rule is that if there is no judicial participation in the seizure, there is no need to look further—the procedure is unconstitutional *per se. Johnson v. American Credit Company of Georgia,* 581 F.2d 526, 534-35 and n.16. (5th Cir. 1978).

There can be no doubt but that the Admiralty Rules are deficient. *Accord, Karl Senner* Slip Op. at 1; *Vessel Susan; The Bay Ridge; Grand Bahama,* 450 F.Supp. at 458. First, the Admiralty Rules do not provide for the

participation in the seizure by a judge or magistrate. As in *North Georgia,* the clerk of court is the only official involved. All he does is "rubber stamp" that which the plaintiff directs to be done. Upon the filing of a complaint, he automatically issues a warrant for the seizure. Admiralty Rule C(3). Indeed, even Judge Hannay below acknowledged this when he pointed out that the Writ of Seizure was issued by the Clerk. March 26, 1980 Mem. Rul. at 2. Thus, a totally frivolous or wrongful seizure could occur, and no judge would have an opportunity to protect the owner and prevent this before the seizure occurred. Under the Fifth Circuit rule in *Johnson, supra,* 581 F.2d at 534-35 and n.16, which was totally ignored by the lower court, this should have been the end of Judge Hannay's analysis, and the Admiralty Rules challenged herein should have been held unconstitutional for this reason alone. Yet, other constitutional prerequisites are also absent.

Second, and closely related to the absence of judicial participation, is the fact that the complaint upon which the seizure issues can be conclusory, as in *North Georgia.* Admiralty Rules C and E require only that the complaint, which is to be stated with "particularity", (a) describe the property and (b) state that it is within the district. There is no requirement, as there was in *Mitchell,* that the plaintiff state the reasons why a seizure is necessary and justified under the special circumstances. 416 U.S. at 605, 40 L.Ed.2d at 412. Moreover, while the complaint is to be verified, it apparently need not be based on first-hand knowledge (*see, North Georgia,* 419 U.S. at 607, 42 L.Ed.2d at 757). Indeed, even if the complaints were required to contain specifics designed to protect the debtor,

certainly the clerk of the court cannot be expected or relied upon to evaluate it as a judge could do. *Roscoe v Butler,* 367 F.Supp. 574, 581-82 (D. Md. 1973). *Accord, Guzman v. Western Bank,* 516 F.2d 125, 130-31 (8th Cir. 1975).

Third, as in *North Georgia,* the Admiralty Rules provide absolutely no opportunity for a prompt post-seizure hearing relating to the merits or otherwise. The Supreme Court stated in *North Georgia* that the absence of such a hearing is the most crucial constitutional defect. 419 U.S. at 613, 42 L.Ed.2d at 761 (footnote omitted). Without such a hearing, there is no prompt opportunity to assure that the seizure was proper or that the creditor was entitled to obtain it. A mistaken or wrongful seizure will simply go uncured. The only method available in the Admiralty Rules for promptly vacating the seizure is the filing of a bond. Yet, this is not enough, as the Supreme Court held in *North Georgia* and *Fuentes.* Indeed, such a procedure does not eliminate the deprivation of property, rather it merely allows for the substitution of one form of deprived property (money) for another. As noted in *North Georgia,* "due process precludes imposing the additional burden of conditioning the debtor's ability to question the validity of [the garnishment's] issuance or continuation on the filing of a bond." 419 U.S. at 613, 72 L.Ed.2d at 761.** Finally, the plaintiff is not required to post a bond to protect the defendant against damages, as was required in *Mitchell.*

Thus, in comparing the Admiralty Rules to the statute held unconstitutional in *North Georgia,* it is evident that:

** *Mitchell* gave credence to this purported "protection" only when it was an *optional, alternative* method to the post-seizure hearing available to the debtor.

(a) All three of the missing elements in *North Georgia* are also absent here.

(b) Further, one protection present in *North Georgia* (plaintiff's bond) is not provided for in the Admiralty Rules.

The court in *Grand Bahama* was thus correct that *North Georgia* is controlling as to the Admiralty Rules, and that those Rules are unconstitutional. 450 F.Supp. at 456, *accord, Karl Senner* Slip Op. at 9, 12. It is thus clear that the Admiralty Rules' prejudgment seizure and posting security rules are unconstitutional under the general rule. Only if the provisions of Rule C and E can be excluded from the general rule and can be held subject to the "exceptional situations" rule, can this Court uphold their constitutionality.

See the excellent opinion of Judge Adkins in the case of *P. C. International, Inc. v. Vessel "Susan"*, 1980 A.M.C. 2062 (S.D. Fla. 1980) which was rendered on May 7, 1980, in the United States District Court for the Southern District of Florida. The opinion is very persuasive in pointing out the deficiencies of Rule C. Indeed, Judge Adkins found Admiralty Rule C unconstitutional notwithstanding local rules in the Southern District of Florida providing for a bond and judicial participation prior to the arrest.

With respect to Rule C, see also the following law review articles:

(a) Compromise provisions regarding in rem procedures. 27 Am. J. Comp. L. 407-19 ('79).

(b) Maritime attachment and arrest; facing a jurisdictional and procedural due process attack. 35 Wash. & Lee L. Rev. 153 ('78).

(c) 3 Maritime Lawyer 155 at 172 ('77).

(d) Due process in Admiralty arrest and attachment. 56 Tex. L. Rev. 1091 ('78).

(e) Due process mandate and the constitutionality of Admiralty arrests and attachments pursuant to Supplemental Rules B and C. 12 Vand. J. Trans. L. 421 ('79).

(f) Constitutional challenge to maritime seizures. 26 Loyola L. Rev. 203 ('80).

With respect to Rule B, see also the following law review articles:

(a) Maritime attachment—procedures set forth in supplemental admiralty rule B(1) do not comply with minimum standards of due process as currently defined in the United States. 4 Int'l Trade L.J.L. 359 ('79).

(b) Constitutional limitations on the admiralty jurisdiction of the federal court. 5 Dalhousie L.J. 568 ('79).

(c) Maritime attachment is valid basis for federal jurisdiction despite absence of defendant's minimum contacts with the forum, however, admiralty supplementary rule B(1) procedure for invoking attachment remedy unconstitutionally violates procedural due process. 18 Va.J. Int.L. 829-37 ('78).

(d) The constitutionality of maritime attachment. 12 J. Maritime L. & Commerce 97 ('80).

(e) Admiralty—procedure for maritime attachment found unconstitutional. 53 Tul. L. Rev. 944 ('78).

(f) Maritime attachment under Rule B: a jurisdictional disguise for an unconstitutional security attachment. 43 Brooklyn L. Rev. 403 ('77).

(g) The use of maritime attachment as a jurisdictional device. 12 Cornell Int. L. J. 329 ('79).

2. Unconstitutionality Under The "Exceptional Situations" Rule

The exception to the general rule developed in the *Sniadach - Fuentes - Mitchell - North Georgia* cases is to be applied in "exceptional situations" only. In such situations, notice and an opportunity for hearing may be postponed. As the court in *Fuentes* correctly observed, these extraordinary situations are "truly unusual", to be applied in only a few limited situations. 407 U.S. 90, 32 L.Ed.2d at 576. Thus, in order to qualify under this exception, a statute must meet *all* of the elements of a three-pronged test, outlined in *Fuentes,* 407 U.S. at 91, 32 L.Ed.2d at 576. If the procedure fails to fulfill any one of these three requirements, the exception will not be available. *Grand Bahama, supra,* 450 F.Supp. at 457. Here, none of the required elements is present.

The first element requires the presence of an important governmental or general public interest. This type of interest relates to an interest involving the prevention of serious harm to the public. This interest has been traditionally found only in cases such as *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 40 L.Ed.2d 452 (1974), (upholding the *governmental* seizure of a boat used to smuggle marijuana);* *Phillips v. Commis-*

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* Lest there be any suggestion that the *Calero-Toledo* case is applicable to our case because it involved a ship, it should be noted:

sioner, 238 U.S. 589, 75 L.Ed. 1289 (1931) (collection by the government of federal revenue); *Fahey v. Malonee*, 332 U.S. 245, 91 L.Ed. 2030 (1947) (government seizure to protect against the economic disaster of a bank failure); *Ewing v. Mytinger and Casselberry*, 339 U.S. 594, 94 L.Ed. 1088 (1950) (government seizure to protect the public from hazardous substance); and *U.S. v. Articles of Hazardous Substance*, 588 F.2d 39 (5th Cir. 1978) (seizure of hazardous children's wear). The need for and justification of the foregoing *governmental* seizures are obvious—in each case a readily observable interest of public health or safety was at stake.

As the courts in *Grand Bahama, Susan, Bay Ridge* and *Karl Senner* held, the fact that this is an admiralty proceeding does not alter this conclusion. 450 F.Supp. at 457. The action is still a private creditor's suit to recover an alleged debt.

As such, no sufficient general public interest is advanced under the Admiralty Rules.

At least one case, *Central Soya, supra*, erroneously found a "public interest" based upon its conclusion that the Admiralty Rules, purpose was to create a method of obtaining jurisdiction over non-resident defendants. 417 F.Supp. at 663-64. Yet, in support of this, the court relied solely on the early case of *Ownbey v. Morgan*, 256

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1. The seizure of the ship in that case was *not* done pursuant to the Admiralty Rules, and those rules were not involved in any way. 416 U.S. at 665, 40 L.Ed.2d at 458.

2. The seizure was made by the government pursuant to the police power. 416 U.S. at 679-80, 40 L.Ed.2d at 466.

3. The Supreme Court found reasonable cause for the seizure under the particular facts and circumstances relating to the illicit drugs involved. *Id.*

U.S. 94, 65 L.Ed. 837 (1921), decided long before the *Sniadach* line of cases, though mentioned in *Fuentes*. This reliance was in error, because, after *Centrol Soya*, the Supreme Court itself distinguished *Ownbey*. *Shaffer v. Heitner*, 433 U.S. 186, 194 n.10, 53 L.Ed.2d at 683, 691 n.10 (1977). *See also, Jonnet v. Dollar Savings Bank*, 530 F.2d 1123, 1128 (3rd Cir. 1976).

Moreover, even if the interest of jurisdiction can be said to be "public" under the first element of *Fuentes*, Admiralty Rules C and E are not limited to such cases. Rather, they apply even to cases where the defendant resides in the district and seizure is not necessary for jurisdiction. Accordingly, that could not have been the purpose of the Rules and, even if it were, the statute is unconstitutionally broad since it covers cases where jurisdiction otherwise exists as well. *Accord, Sniadach*, 395 U.S. at 339, 23 L.Ed.2d at 352. Thus, for all of these reasons, the fact that the arrest can be used to obtain jurisdiction does not satisfy the first element of *Fuentes*.

The second element requires the need for very prompt action. However, the Admiralty Rules are not limited to such situations, nor do they require the plaintiff to show such a need before seizure will issue.

Just because an action involves vessels does not necessarily lead to the conclusion that those vessels are always about to leave the country, thus requiring immediate action. There have been recent examples of the due process abuse that Rules C and E allow in this respect. One example is in the case of the *Dredge Gillespie* which is also petitioning for a Writ of Certiorari. The vessels in that case had local operations and were in their position for six months prior to the seizure. Another drastic example

is in the case of *Brownsville Navigation District v. M/V ARTIC STAR*, Civ. No. B-82-5 (S.D. Tx.) where plaintiff seized a vessel that had been at the same wharf area for five years and was patently not going anywhere since it was undergoing repairs at the wharf after being struck by a railroad train. (*See Zanzibar Shipping v. Missouri-Pacific Railroad Company*, Civ. No. B-80-241 (S.D. Tx., Feb., 1982)). There was no judicial hearing before the seizure.

Finally, even if the first two elements were present (which, as shown above, is not the case), the third element is not present and, for that reason alone, this is not an "exceptional situation." The third element requires (a) governmental initiation or supervision, (b) pursuant to a narrowly drawn statute. The Admiralty Rules provide neither. The seizures are initiated by *private* parties, without any governmental inquiry or discretion. The private plaintiff merely files a complaint, and the seizure of the property automatically occurs. In addition, there are no meaningful standards in the Rules against which to measure the request for seizure. 407 U.S. at 93, 32 L.Ed. 2d at 577. There can be no doubt that the third requisite of the "exceptional situation" is missing since, under the Admiralty Rules, the private party initiates the seizure under a broadly-drawn statute without governmental supervision. Thus, the "exceptional situation" exception is not applicable to the Admiralty Rules.

3. Admiralty Rules C and E Are Unconstitutional For Precluding The Minimum Contacts Analysis

In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) this Honorable Court held that the

mere presence of the defendant's property in Delaware was not enough constitutionally for jurisdiction to be asserted over the defendant in Delaware. It was held to be a violation of the due process clause of the United States Constitution to assert jurisdiction over the defendant without a determination of whether the defendant had sufficient minimum contacts with the state to accord with the due process test of the Supreme Court decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95.

The lower Court in the present case asserted jurisdiction over the defendant pursuant to Admiralty Rules C and E merely because defendant's property was in Houston, Texas. This is substantially the same thing that the lower Court in *Shaffer* did to the defendant in that case pursuant to a Delaware statute. There was no judicial determination of "minimum contacts" in either case. The seizure of the HOEGH SHIELD was thus improper under the dictates of the decision of this Honorable Court in *Shaffer v. Heitner.*

Law review articles discussing the constitutionality of the Admiralty Rules in view of *Shaffer* include the following:

(a) Applicability of *Shaffer* to admiralty *in rem* jurisdiction. 53 Tul. L. Rev. 135 (1978).

(b) The effect of *Shaffer* on Maritime Attachment. If the shoe fits. . . . 3 Maritime Lawyer 317 (1978).

(c) *Shaffer v. Heitner* and Rule B Maritime Attachment. 12 NYU J. Int'l. L & Pol. 343 (1979).

4. The Admiralty Rules Are Not Exempt From Due Process Just Because Admiralty Law Is "Venerable"

Plaintiffs herein have argued that there is a fundamental difference between admiralty law and "land locked" law which renders the Admiralty Rules immune from the procedural due process requirements of the Fifth Amendment as interpreted in *Sniadach, Fuentes, Mitchell, Shaffer* and *North Georgia*. Yet, this cannot be so.

Defendants are mindful of the long history and unique nature of admiralty law and would be naive to suggest that under no circumstances could a procedure be promulgated allowing for valid arrests. Defendants do not challenge the substantive validity and concept of arrest, and certainly do not seek to abrogate the principles of admiralty law. Rather, Defendants challenge only the constitutionality of the procedures that presently exist under the Admiralty Rules.

D. The Constitutionality Of The Admiralty Rules Was Properly Raised In This Case Where The Writ Of Seizure Was Issued Pursuant To The Said Rules And The Marshal Was In The Process Of Executing The Writ On The Vessel, When Security Pursuant To Rule E(5) In An Amount Sufficient To Satisfy The Plaintiff Had To Be Surrendered Without Due Process Of Law.

On or about December 1, 1977, plaintiff filed this suit in the United States District Court for the Southern District of Texas. Without prior notice or hearing to the vessel owner, A/S ALLIANCE, or any judicial hearing,

the plaintiff had a writ of seizure issued in regard to the Norwegian flag vessel HOEGH SHIELD. Under the actual, clear and present writ of seizure, and the U.S. Marshal on the way to seize the vessel, the owners posted security pursuant to Admiralty Rule E(5) in an amount sufficient to satisfy the plaintiff. The security had to be posted pursuant to Admiralty Rule E(5) without any prior judicial hearing, and without constitutional due process of law. The issue of constitutionality is ripe for resolution. The vessel's owner has standing to challenge the constitutionality of Admiralty Rules C and E. See *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), *Barlow v. Collins,* 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970).

E. Conclusion

For the foregoing reasons this Court should reverse the ruling that defendant-claimant-owner has been afforded the protections required by the Constitution and should vacate and invalidate the seizure of the Vessel.

II. The Choice of Substantive Law in the Courts Below was in Error

A maritime lien arises out of either a contract or a tort. *International Terminal Operating Co. v. S.S. Valmas,* 254 F.Supp. 486 (D. Md. 1966), *aff.* 375 F.2d 586 (4th Cir. 1967); Gilmore and Black, THE LAW OF ADMIRALTY, § 9-2, at 587 (1975). The lien claimed in this case arises from a contract. A lien is an incident of and inseparable from a contractual debt. *Allen v. Texaco,* 510 F.2d 977 (CA5, 1975); *University Savings & Loan As-*

soc. v. Security Lumber Co., 423 S.W.2d 287 (Tex. 1967). Viewed as a contractual matter the Court of Appeals held that the arguments that English law should apply are "persuasive".

The Fifth Circuit viewed the choice of law question in regard to the maritime lien as separate from the choice of law question in regard to the contract as a whole however. It cited the Maritime Lien Statute, 46 U.S.C. § 971, as the reason for this. This reading of the Maritime Lien Statute is in error since, as the Supreme Court has held in its prior decisions, wider choice of law considerations cannot be ignored in the international realm of maritime commerce.

The Maritime Lien Statute, just as the Jones Act, 46 U.S.C. § 688, does not say anything about international choice of law problems. If read literally they could confer use of substantive American law on a contract for supplying a vessel that was negotiated and made in China between Chinese, and whose intent was that Chinese law apply.

The subject contract was negotiated and entered into in Great Britain (Fifth Circuit opinion, p. 4). The parties were an American corporation doing business in Great Britain and a Norwegian vessel flying the Norwegian flag (Fifth Circuit opinion, p. 4-5).

The Supreme Court decision in *Liverpool & G.W. Steam Co. v. Phoenix Ins. Co.,* 129 U.S. 397, 9 S.Ct. 469, 474, 476, 478, 32 L.Ed. 788, 794, 796, 798 (1889) pointed out that the incidents of an international maritime contractual transaction are not necessarily to be substantially ruled by American law. The case also involved a contract made in Great Britain:

> The general rule is that where a contract is made in England between merchants carrying on business there, as this is, but to be performed elsewhere, the construction of the contract, and all its incidents, are to be governed by the law of the country where the contract is made, unless there is something to show that the intention of the parties was that the law of the country where the contract is to be performed should prevail.

The 1889 *Liverpool* opinion is the last opinion by this Honorable Court deciding on the issue of choice of law in connection with an international maritime contract that did not have an express choice of law provision.

The Supreme Court in the more recent landmark decision of *Lauritzen v. Larsen,* 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) again spoke of choice of law in the international maritime context. International choice of law under the Jones Act, 46 U.S.C. § 688, was at issue in *Lauritzen.* Like the Maritime Lien Statute, 46 U.S.C. § 971, at issue in this case, the Jones Act would have universal application if applied literally. The Supreme Court, however, rejected the notion that the American statute, i.e. American substantive law, should be used without a thorough consideration of the circumstances and contacts of the international maritime transaction. At pages 925-26 of 73 S.Ct.:

> The shipping laws of the United States, set forth in Title 46 of the United States Code, 46 U.S.C.A., comprise a patchwork of separate enactments . . . While some have been specific in application to foreign shipping, many give no evidence that congress addressed itself to their foreign application and are in general terms which leave their application

> to be judicially determined from the context and circumstance. By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law. 73 S.Ct. at 925-26 . . .

And at page 928 of 73 S.Ct.:

> Respondent places great stress upon the assertion that petitioner's commerce and contacts with the ports of the United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of seaborne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations . . . in dealing with international commerce we cannot be unmindful of the necessity for mutual forebearance if retaliations are to be avoided.

See also the opinion of this Honorable Court in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 1912, 32 L.Ed. 513 (1972).

The place of contracting was not fortuitous in this case. The plaintiff-supplier's agent resided in London,

which was also the principal place of business of the contracting charterer, Multinational. As reflected from plaintiff's credit file on Multinational, there was a long history of bunker fuel supplied to many vessels in various parts of the world based on contracts reached in Great Britain. The center of the long contractual relationship between Gulf and Multinational was Great Britain—London, England. The places of performance of the great number of contracts between Gulf and Multinational were fortuitous, depending on where the vessels were that Multinational needed to fuel. Gulf has fuel locations all over the world. Multinational's chartered vessels sailed all over the world. For the commercial purpose for which Multinational and Gulf contracted, the provision of fuel for Multinational's chartered vessels in their world movements, it is reasonably evident that the parties would desire the stability in their relationship of the law of the place of contract applying to their widely dispersed and fortuitous fuel stops. Otherwise, the law of possibly forty or more different nations would have to be looked at, depending on the fortuitous occurrence of where a vessel was when Multinational needed fuel for such vessel. See Restatement (Second) of Conflict of Laws § 251(2), Comment e.

Whether or not the law of Great Britain would be more or less favorable to one of the parties should be given no substantial weight, just as in applying the *forum non conveniens* doctrine in international transactions. See *Piper Aircraft v. Reyno*, ____U.S.____, 102 S.Ct. 252, 70 L.Ed.2d 419, 1982 A.M.C. 214 (Dec. 8, 1981, JUSTICE MARSHALL writing the opinion of the Court).

REASONS RELIED ON FOR SEEKING THIS WRIT OF CERTIORARI

When this case was set for oral argument in the Fifth Circuit, the Court consolidated this case with the case of *The Dredge General G. L. Gillespie, etc., et al. v. The Merchants National Bank of Mobile, et al.* for argument. The Court permitted the Maritime Law Association to intervene and file its amicus curiae brief and permitted counsel for said Association to participate in the oral arguments.

Because of the importance of this case to Admiralty laws and procedures, we join Charles G. Black, Esquire, counsel for Claimant-Appellant in *The Dredge General G. L. Gillespie* case in requesting the Court to grant these related applications for Writ of Certiorari to review the constitutionality of Admiralty Rules C and E.

It is to be emphasized that the constitutionality of Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims has not been decided by this Honorable Court.

The conflict of laws issue in regard to the Maritime Lien Act is also of great importance to Admiralty law and international law. The Fifth Circuit did not hold to the tenor of previous Supreme Court opinions such as *Lauritzen* by its holding that appears to be that United States substantive law will be applied whenever a ship is supplied within United States waters by an American, regardless of all other factors.

The Supreme Court *Lauritzen* decision was on conflict of laws in connection with the Jones Act, a statute dealing with tort. It is to be emphasized that since 1889 there has

been no opinion by this Honorable Court in regard to conflict of laws in connection with maritime liens, or maritime contracts, where there was no express choice of law provision.

Rule 17 of the rules of the Supreme Court states that a review on Writ of Certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioners submit that this case has "special and important reasons" for granting this writ.

Further, Rule 17.1, in part, states:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

While Petitioners recognize that there have been now two Circuits (Fourth and Fifth) that have ruled these Admiralty Rules constitutional, there have been several District Court cases holding that the rules are unconstitutional.

It is to be further emphasized that Judge Tate wrote a scholarly dissenting opinion in the related case of *The Dredge General G. L. Gillespie,* stating that in his opinion Admiralty Rule C is unconstitutional.

It would seem to Petitioners, now that the prejudgment seizure and security procedures of the Supplemental Rules for Certain Admiralty and Maritime Claims have been attacked as being unconstitutional, that this Honorable Court should issue this Writ of Certiorari and resolve the question. It would also seem to Petitioners that this Honorable Court should give direction and resolve the issue of international choice of law concerning Maritime contracts and the Maritime Lien Statute, which significantly affect international maritime commerce involving this nation.

CONCLUSION

For the foregoing reasons, this Court should:

1. Reverse the District Court's and Court of Appeals' Ruling and hold the procedures of Rules C and E of the Admiralty Rules unconstitutional;

2. Reverse the District Court and Court of Appeals regarding choice of law, and remand; and

3. Petitioners pray for such other relief as is mete and proper.

This 10th day of April, 1982.

Respectfully submitted,

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Of Counsel:

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CERTIFICATE OF SERVICE

I, Robert M. Julian, hereby certify that I have served three copies of the foregoing Petition for a Writ of Certiorari upon Respondent herein, by mailing same to James Patrick Cooney, Esquire, of Royston, Rayzor, Vickery & Williams, Attorney for Gulf Trading and Transportation Company, 2200 Texas Commerce Tower, Houston, Texas 77002, United States Postage prepaid, on this 10th day of April, 1982.

ROBERT M. JULIAN

Appendix

APPENDIX A

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Adopted February 28, 1966, effective July 1, 1966

Rule C. Actions In Rem: Special Provisions

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navi-

gable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Process. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

(4) Notice. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) Ancillary Process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because

it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

APPENDIX B

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Adopted February 28, 1966, effective July 1, 1966

Rule E. Actions In Rem and Quasi In Rem: General Provisions

(1) Applicability. Except as otherwise provided, the rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) Complaint; Security.

(a) *Complaint.* In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

(b) *Security for Costs.* Subject to the provisions of Rule 54(d) and of relevant statutes, the court may, on the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against him by any interlocutory order or by the final judgment, or on appeal by any appellate court.

(3) Process.

(a) *Territorial Limits of Effective Service.* Process in rem and of maritime attachment and garnishment shall be served only within the district.

(b) *Issuance and Delivery.* Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

(4) Execution of Process; Marshal's Return; Custody of Property.

(a) In General. Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) Tangible Property. If tangible property is to be attached or arrested, the marshall shall take it into his possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshall shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or his agent. In furtherance of his custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or his deputy or by the clerk that the vessel has been released in accordance with these rules.

(c) Intangible Property. If intangible property is to be attached or arrested the marshal shall execute the process

by leaving with the garnishee or other obligor a copy of the complaint and process requiring him to answer as provided in Rules B(3)(a) and C(6); or he may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) Directions with Respect to Property in Custody. The marshal may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(e) Expenses of Seizing and Keeping Property; Deposit. These rules do not alter the provisions of Title 28, U.S.C. § 1921, as amended, relative to the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

(5) Release of Property.

(a) Special Bond. Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount

of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

(b) General Bond. The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court, in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

(c) Release by Consent or Stipulation; Order of Court or Clerk; Costs. Any vessel, cargo, or other property in

the custody of the marshal may be released forthwith upon his acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or his attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action, but the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

(d) Possessory, Petitory, and Partition Actions. The foregoing provisions of this subdivision (5) do not apply to petitory, possessory, and partition actions. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.

(6) Reduction or Impairment of Security. Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional sureties may be required on motion and hearing.

(7) Security on Counterclaim. Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given

shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.

(8) Restricted Appearance. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) Disposition of Property; Sales.

(a) Actions for Forfeitures. In any action in rem, to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.

(b) Interlocutory Sales. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on

application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adquate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to him, upon the giving of security in accordance with these rules.

(c) Sales; Proceeds. All sales of property shall be made by the marshal or his deputy, or other proper officer assigned by the court where the marshal is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

APPENDIX C

46 UNITED STATES CODE, SECTION 971

§ 971. Persons entitled to lien

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel. (June 5, 1920, ch 250, § 30, Subsec. P, 41 Stat. 1005.)

APPENDIX D

GULF TRADING & TRANSPORTATION CO.,
Plaintiff-Appellee,

v.

The VESSEL HOEGH SHIELD, her engines, tackle and appurtenances, in rem,
Defendant,

A/S Alliance, Claimant and owner of the Vessel HOEGH SHIELD, her engines, tackle and appurtenances, in rem,
Claimant-Appellant.

No. 80-1988.

United States Court of Appeals, Fifth Circuit.*

Unit A

Oct. 7, 1981.

Admiralty action in rem was brought. The United States District Court for the Southern District of Texas, Allen B. Hannay, J., entered judgment. Appeal was taken. The Court of Appeals, Brown, Circuit Judge, held that: (1) applicable substantive law was American; (2) trial court did not deny procedural due process of law to vessel's owner by rendering judgment without submission of briefs for hearing on central issue; and (3) present maritime in rem procedures are sufficient to fulfill constitutional due process requirements.

Affirmed.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452 —October 14, 1980.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN and TATE, Circuit Judges, and SMITH**, District Judge.

JOHN R. BROWN, Circuit Judge:

Before us is an admiralty action *in rem* brought by plaintiff Gulf Trading & Transportation Company (Gulf), a division of Gulf Oil Corporation. The action was brought against the Vessel HOEGH SHIELD (Vessel), a vessel documented under the laws of and flying the flag of Norway and owned by A/S Alliance of Oslo, Norway. At all material times, the Vessel was under time charter to Multinational Gas & Petrochemical Co. (Multinational). Under the charter, Multinational was required to provide bunkers to the Vessel. About July 1, 1977, Multinational made a request of Gulf's London office to arrange for the delivery of bunkers to the Vessel at Cristobal, Canal Zone. On July 5, 1977, intermediate fuel oil and marine diesel oil were delivered to the Vessel at Cristobal, and an invoice was sent to Multinational in London. The invoice has never been paid.

Subsequent to the above transactions, Multinational became insolvent. About December 1, 1977, the Vessel arrived at the Port of Texas City, Texas. This action was commenced by a complaint which expressly invoked F. R. Civ. P. 9(b) and prayed for the issuance of traditional process and judgment *in rem*, and a Writ of Seizure was

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** District Judge of the Northern District of Mississippi, sitting by designation. Judge Orma R. Smith was a member of the panel that heard oral arguments, but due to illness did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. 46(d).

issued, but prior to the seizure of the Vessel, an agreement was reached for the posting of security. No bunkering contract existed between Gulf and the Vessel's owner at any relevant time. The Canal Zone was within the jurisdiction of the United States at all times material to the delivery of the bunkers to the Vessel and the filing of the complaint.

In The District Court

The owner of the Vessel contends that the exercise of *in rem* admiralty jurisdiction over the Vessel offends the Due Process Clause of the Fifth Amendment of the United States Constitution under the Supreme Court's decision in *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); *see also Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349. The District Court distinguished the rule in *Shaffer*, which involved sequestration of local assets to obtain jurisdiction over nonresident defendants from an admiralty action *in rem* to enforce a maritime lien against a foreign vessel that accepts necessaries delivered within the jurisdiction of the United States.

The Vessel's owner also raises the issue of whether the law of the United States, England, or Norway should apply. The District Court held that because the bunker fuel was delivered to a foreign flag vessel by an American supplier within the jurisdiction of the United States, and because the invoices specified payment in the United States, the admiralty and maritime law of the United States applied to this case.[1]

1. The District Court also held that a dismissal of this action under the doctrine of *forum non conveniens* was not called for.

The District Court further held that the bunker fuel delivered by Gulf to the Vessel in the Canal Zone constituted a "necessary" within the meaning of § 971 of Title 46, U.S.C.A., and thus a maritime lien arose upon the furnishing of the fuel absent a finding that the necessary was furnished solely on personal credit. The Court observed that while Gulf obviously relied upon the credit of Multinational, no evidence exists that Gulf relied solely on the personal credit of Multinational or otherwise disclosed an intention to forego its maritime lien in the Vessel. The Court concluded that Gulf acquired a maritime lien in the Vessel upon the delivery of bunkers to that vessel in the Canal Zone.

The District Court found it unnecessary to rule on the constitutionality of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, F. R. Civ. P., and awarded judgment to Gulf for the contract value of the fuel plus interest.

Arguments On Appeal

The Vessel's owner, A/S Alliance, brought this appeal, urging that (i) the applicable substantive law in this case is English Law; (ii) the District Court denied procedural due process of law to the Vessel's owner by rendering judgment without submission of briefs or a hearing on the central issues in this cause, thereby precluding the Vessel's owner from compelling answers to interrogatories relevant to the choice of law issue; (iii) the Vessel's owner received no benefit from the fuel contract between Gulf and Multinational, and Gulf did not rely on the credit of the Vessel, so no maritime lien exists against the vessel even if American law is applied; and (iv)

present maritime *in rem* procedures are insufficient to fulfill Constitutional due process requirements.

The Vessel's owner points out that Gulf and Multinational had a long relationship of contracting in England for fuel for Multinational's chartered vessels, and argued that the stability of the relationship between Gulf and Multinational indicated that they intended English law to apply in these fuel contracts rather than the laws of the many nations where fuel was supplied. Moreover, Gulf's credit clerk, when deposed, suggested that the fuel was furnished on the credit of Multinational. When the fuel was not paid for, the Vessel could have been seized immediately, but Gulf took no such action until Multinational became insolvent, thus depriving the Vessel's owner of any meaningful action against Multinational for whose direct benefit the fuel was ordered. Without prior hearing the Vessel was to be seized by the United States Marshal in Houston. Therein lies the Vessel-owner's claim that the admiralty *in rem* procedures are constitutionally inadequate, even though the vessel was never actually seized.

Choice Of Law: English Or American?

Of critical importance to the choice of law issue before us is our determination, discussed *infra,* that a maritime lien on the Vessel existed in favor of Gulf. As will become clear, our conclusion below that United States law applies to the present controversy is limited to the unique circumstances surrounding a maritime lien as well as the statutory directives found in the Maritime Lien Statute, 46 U.S.C. § 971. This is not to say that this Court is permitted to bootstrap its determination of choice of law

by a preliminary finding that a maritime lien exists, but only suggests that the initial choice of law determination is significantly affected by the statutory policies surrounding a maritime lien.[2]

A modern approach to maritime conflict of law problems was introduced in *Lauritzen v. Larson*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), 1953 A.M.C. 1210. *Lauritzen* involved a torts claim under the Jones Act, and is thus distinguishable on its facts from the present controversy. Nevertheless, the Court's approach in reviewing many of the factors that are generally conceded to influence choice of law governing a tort claim, and its assignment of weight and significance to each factor, presents a useful outline for our present determination.[3]

A distinction must be drawn at the outset between the express contract to provide bunkers involving only Gulf and Multinational *and* the application of a maritime lien

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2. *See Lauritzen v. Larson*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), 1953 A.M.C. 1210:

> Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.

Id. at 582, 73 S.Ct. at 928, 97 L.Ed. at 1267, 1953 A.M.C. at 1218-19.

3. The *Lauritzen* Court considered (i) the place of the wrongful act, (ii) the law of the flag, (iii) the allegiance or domicile of the injured, (iv) the allegiance of the defendant shipowner, (v) the place of contract, (vi) the inaccessibility of a foreign forum, and (vii) the law of the forum. 345 U.S. at 583-91, 73 S.Ct. at 928-32, 97 L.Ed. at 1268-72, 1953 A.M.C. at 1219-26.

in favor of Gulf against the vessel. Gulf's claim to a maritime lien in the Vessel arises by operation of law rather than by contract because the Vessel's owner was not a party to the contract between Gulf and Multinational. *See Rainbow Line, Inc. v. M/V Tequila*, 480 F.2d 1024, 1026 (2d Cir. 1973), 1973 A.M.C. 1431, 1433. The present controversy, and the validity of the maritime lien imposed upon the Vessel, is broader than the failure of Multinational to pay for the necessaries provided to the Vessel.

Viewed solely as a contract dispute, the Vessel owner's arguments that English law should apply are persuasive. Section 188 of the *Restatement (Second) of Conflicts of Law* suggests that in the absence of an effective choice of law by the parties, the forum contacts to be considered include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. Here the place of contracting was Great Britain, where Gulf contracted to provide bunkers to the Vessel chartered to Multinational. The place of negotiation was also Great Britain, although Gulf argues in its brief to this Court that some negotiations occurred in New York when the order for the delivery of bunkers was confirmed by telex from the Gulf bunkering office in New York. The place of performance, a significant factor, was the Canal Zone, which was at the time of the performance in the jurisdiction of the United States. The location of the subject matter of the contract can also be construed as the Canal

Zone.[4] Finally, the parties to this action are an American corporation doing business in Great Britain and a Norwegian vessel flying the Norwegian flag. In this isolated analysis, it is arguable that English law would apply to a contract in dispute between Gulf and Multinational. This is, however, only half of the story.

Leaving the contract, and entering the broader context of the maritime lien involving Gulf and the Vessel's owner, the *Restatement (Second) of Conflicts of Law* § 6 sets forth principles to be applied in choice of law matters. In the absence of statutory directives and subject to constitutional restrictions, the relevant factors include (a) the needs of the international system, (b) relevant policies of the forum, (c) relevant policies of other interested states, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. The basis of the present action is the Maritime Lien Statute, which states:

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4. It must be noted that, to the extent not consumed in departure from the Canal Zone, the fuel delivered was immediately carried away from the jurisdiction of the United States.

Comment e to section 188 of the *Restatement (Second) of Contracts of Law* states that when a contract deals with a specific physical thing, or affords protection against a localized risk, the state where the thing or the risk is located will have a national interest in transactions affecting it.

> [The] parties will regard the location of the thing or of the risk as important. Indeed, when the thing or the risk is the principal subject of the contract, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the thing or risk was located would be applied to determine many of the issues arising under the contract.

Id. In the present controversy, the bunker ("thing") was only briefly in the Canal Zone.

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

46 U.S.C. § 971. The congressional intent is that an American supplier of goods, services or necessaries to a foreign vessel obtains a maritime lien in the vessel when the goods or services are supplied or performed in the United States. It is not disputed that the bunkers were furnished by Gulf to the vessel within the jurisdiction of the United States and under the shelter of United States law. This Court has recognized that

> [it] was the intent of the Congress to make it easier and more certain for stevedores and others to protect their interests by making maritime liens available where traditional services are routinely rendered. . . . Speaking to the desired aim of the 1971 amendments [which deleted the clause which had allowed "no lien" provisos in charter contracts], the House Report concludes:
>
> > Granting the materialman a lien encourages the prompt furnishing of necessaries to vessels so that they can be speedily turned around and put to sea. This is especially significant today when the emphasis on vessel performance is reduced port time and increased speed.

Atlantic & Gulf Stevedores, Inc. v. M/V Grand Loyalty, 608 F.2d 197, 201 (1979) (citations omitted). It is our conclusion that the Maritime Lien Statute represents a relevant policy of this forum that serves the needs of the

international legal system as well as the basic policies underlying maritime law. Moreover, there is little difficulty in determining and applying the law in the present controversy, as will be discussed in the next section, *infra*.

Of equal importance in choice of law matters is the predictability of result and protection of justified expectations in a particular field of law. In the maritime realm, it is expected that when necessaries are furnished to a vessel in an American port by an American supplier, the American Maritime Lien Statute will apply to protect that supplier regardless of the place where the contract was formed or the nationality of the vessel. Although, *arguendo*, it is conceivable that the contract between Gulf and Multinational could have specified that English or any other Nation's law would govern the rights under the contract, in the present controversy there is no such intention to override American law.

[1] Finally, we recognize that the policies and interests of other governments are often relevant in the determination of choice of law matters. Despite the fact that the contract between Gulf and Multinational was formed in Great Britain, it cannot be argued that Great Britain would have as great an interest as the United States in protecting an American supplier of fuel to a non-English vessel in an American port. We are thus in complete agreement with the District Court in its application of American instead of English law to the present controversy.

Does A Maritime Lien Exist?

The Vessel's owner, as claimant, argues in the alternative that even if American law applies to the present

controversy, Gulf did not rely on the credit of the vessel in this case. Therefore, the claimant argues, no maritime lien exists. It points out that Gulf's agent, in a deposition, stated that the credit in this instance was extended to the charterer, Multinational, and further observes that no conversations took place between Gulf's credit department and the Vessel's owner. Moreover, no invoice was sent to the Vessel's owner.

[2, 3] The Maritime Lien Statute, 46 U.S.C. § 971, provides that a supplier of necessaries to a vessel shall have an enforceable maritime lien on the vessel, "and it shall not be necessary to allege or prove that credit was given to the vessel." *See Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 273, 60 S.Ct. 937, 940, 84 L.Ed. 1197, 1200, 1940 A.M.C. 647, ____. A presumption therefore arises that one furnishing supplies to a vessel acquires a maritime lien, and the party attacking this presumption has the burden of establishing that the personal credit of the owner or charterer was solely relied upon. In *Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co.*, 261 F.2d 861, 867 (5th Cir. 1958), this Court held that in order to overcome the presumption, evidence must be produced that would permit "the inference that the supplier purposefully intended to forego the valuable privilege which the law accords. . . ." *Id.*

We agree with the District Court's conclusion that while Gulf obviously relied upon the credit of the charterer Multinational in furnishing bunkers to the Vessel, there is no evidence that Gulf relied *solely* on the personal credit of Multinational or otherwise took any action with the purposeful intention of foregoing its maritime lien in the Vessel. Although we agree with the claimant that it is

possible for the furnisher of supplies to waive its right to a lien,[5] we agree with the District Court's holding that the record indicates that the transaction was carried out in such a way as to preserve Gulf's maritime lien. The Marine Bunker Delivery Receipts, as well as the invoice sent to Multinational, reflect the name of the Vessel HOEGH SHIELD. We agree with Gulf that when the transaction is considered as a whole, nothing was purposely done by Gulf to waive the maritime lien that arose as a matter of statutory law upon the furnishing of bunker fuel to the Vessel in a United States port.

Procedural Due Process In The Trial Court

[4] The Vessel's owner also argues that it was denied procedural due process by the Trial Court's rendering judgment without allowing submission of briefs or a hearing on the central issue in this controversy. It claims that the Trial Court's action in this regard precluded it from moving for compulsion of answers to certain interrogatories relevant to the choice of law issue discussed above. Apparently, the Vessel's counsel understood that following a choice of law determination, the parties would submit briefs on the central issue of whether a maritime lien existed on the Vessel. Gulf argues that the Vessel's owner knew and understood that the case was being submitted for final determination on a stipulated record. The Vessel's owner, Gulf argues, was not prevented from filing a brief on the remaining unresolved issues.[6]

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5. *See* 46 U.S.C. § 974.

6. The District Court, in its memorandum and opinion of March 26, 1980, directed the parties "to come forward with the remaining issue or issues."

The District Court, having heard the evidence and argument of the parties in this controversy, entered a final judgment in favor of Gulf on August 12, 1980. The Memorandum and Opinion of August 12, 1980, was clearly dispositive of the entire case, and because no motion was made at that time by the Vessel's owner regarding additional evidence and argument, we regard this issue as inconsequential.

The Constitutionality Of Rule C

[5] The final argument of the Vessel's owner on this appeal is that the maritime *in rem* procedure is insufficient to fulfill Constitutional due process requirements. Obviously, counsel for the vessel were informed of the impending seizure, following a tradition that goes back to the origin of the now abandoned title of "Proctor in Admiralty" to accept a letter of undertaking in lieu of seizure. Thus there was no seizure, and hence no seizure without notice. Consequently, the Constitutionality of seizures pursuant to Rule C is not raised and we need not pass on the District Court's handling of this matter.

AFFIRMED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-77-1986

GULF TRADING AND TRANSPORTATION CO.

v.

THE VESSEL HOEGH SHIELD, Her Engines, Tackle and Appurtenances, In Rem

James Patrick Cooney, Suite 3710, One Shell Plaza
Houston, Texas 77002, Attorney for Plaintiff

Robert M. Julian, 512 Great Southwest Building
1314 Texas Avenue, Houston, Texas 77002
Attorney for Claimant

MEMORANDUM AND OPINION:

This in rem suit in admiralty is for the recovery of $54,357.76 plus interest for the delivery of fuel bunkers to the vessel in question.

The material facts herein are stipulated to and are not in dispute.

The Gulf Trading and Transportation Company, hereafter Gulf, is a division of Gulf Oil Corporation, a Corporation incorporated under the laws of Pennsylvania, with its principal place of business in Pittsburg, Pennsylvania. The claimant herein, A/S Alliance of Oslo Norway, is the owner of the Vessel HOEGH SHIELD, here-

after the Vessel, a vessel documented under and flying the flag of Norway.

At all material times the vessel was under time charter to Multinational Gas and Petrochemical Co., hereafter Multinational, whose principal office was in London, England. Under the charter agreement, Multinational agreed to provide to the vessel all bunkers necessary while engaged under the charter to Multinational. Gulf had no actual knowledge of the provisions of the charter agreement at any relevant time.

On or about July 1, 1977, Multinational made a request to Gulf's London office to arrange for the delivery of bunkers to the Vessel at Cristobal, Canal Zone, on July 4, 1977. On July 5, 1977, 528.27 metric tons of intermediate fuel oil and 85.54 metric tons of marine diesel oil were delivered aboard the vessel at Cristobal, Canal Zone by Gulf and receipted for by the Vessel's Chief Engineer. On July 19, 1977, Gulf's Invoice No. 077-0342 in the amount of $54,357.76 was sent by Gulf in Pittsburg to Multinational in London covering the deliveries made to the Vessel on July 5, 1977. Neither in whole nor in part has Gulf's Invoice No. 077-0342 been paid.

Subsequent to the main transaction in this case, Multinational became insolvent and a "winding up" order was entered by the High Court of Justice, Chancery Division, in London on November 14, 1977.

On or about December 1, 1977, the Vessel arrived at the Port of Texas City, Texas, within the Southern District of Texas. This action was commenced and a Writ of Seizure was issued by the Clerk on December 1, 1977.

Prior to the arrest of the Vessel, an agreement was reached among the parties whereby Gulf agreed to refrain from arresting the Vessel and to accept in lieu of other securities a Letter of Undertaking in the amount of $60,000.00 from the Vessel's protection and indemnity underwriter, Assurance-foreningen Skuld of Oslo, Norway. There was no written bunkering contract in existence between Gulf and Multinational at any relevant time. It is not disputed that at material times herein that the Canal Zone, where the bunkers were delivered, was within the jurisdiction of the United States.

I.

Claimant contends as an initial matter that the United States Supreme Court authority of Shaffer v. Heitner, 433 U.S. 186 (1977), defeats jurisdiction of the Vessel. *Shaffer v. Heitner* holds for the proposition that in an in rem action at law, as previously in an in personam action, there must be minimal contacts between the foreign defendant and the jurisdiction where the suit is initiated sufficient to satisfy federal constitutional due process. But the case authorities do not yet support, and reason does not commend, the extension of the rule in *Shaffer v. Heitner* to embrace an admiralty action in rem against a foreign vessel which accepted supplies contracted for within the jurisdiction of the United States. See: Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne De-Navigatione, 605 F.2d 648, 651 (2nd Cir. 1979).

II.

Claimant raises the legal question of what law should apply here. Should it be the law of the place of perform-

ance, the United States, the law of the place of contract, England, or the law of the Vessel's flag, Norway.

In this case, the supplies of bunker fuel, without which the Vessel presumably could not have operated, were delivered within the jurisdiction of the United States. The supplier, Gulf, is located within the jurisdiction of the United States. The Invoice issued by Gulf to cover this transaction specified payment in Philadelphia, within the jurisdiction of the United States. The Court here is faced with a choice of applicable law in the field of conflict of law and of maritime and international law. The case authorities and the Restatement of Law in this area instruct and require a balancing of considerations in arriving at a proper answer. Lauritzen v. Larson, 345 U.S. 571; Romero v. International Terminal Operating Co., 358 U.S. 354; *Restatement of the Law (Second) Conflict of Laws,* Sections 188, 6, 191, and 251(2).

On the strength of the record in this case, the Court is convinced that right and justice compel application of the laws of the jurisdiction where the fuel bunkers were delivered. There is no question here about the underlying contract or its import. There is no question here about the valid and binding agency for the Vessel in the entering of the contract by Multinational. It is indisputable that the Vessel accepted the bunker supplies within the jurisdiction of the United States.

I find and hold that this record discloses no compelling interest, equity, or expectation on the part of Claimant that would warrant the effective transfer of this case to a foreign jurisdiction. I find and hold that the doctrine of *forum non conveniens* does not fairly or properly apply in this case.

The parties to this case have agreed to and sought a separate determination of the foregoing issues. With these determinations now effected the parties are directed to come forward with the remaining issue or issues.

It is so ORDERED.

The Clerk will notify counsel.

Done in Houston, Texas on this the 26th day of March, 1980.

/s/ ALLEN B. HANNAY
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. 77-1986

GULF TRADING & TRANSPORTATION CO.

v.

THE VESSEL HOEGH SHIELD, Her Engines, Tackle and Appurtenances, *in rem*

James Patrick Cooney
Suite 3710, One Shell Plaza
Houston, Texas 77002, Attorney for Plaintiff

Robert M. Julian
512 Great Southwest Building
1314 Texas Avenue
Houston, Texas 77002, Attorney for Claimant-Owner

MEMORANDUM AND OPINION:

This admiralty action *in rem* originally came on by request of the parties upon stipulated facts and a bifurcated determination of the legal questions involved. The Court by its Memorandum and Opinion of March 26, 1980 disposed of the Threshold issues of Law herein. The Claimant-Owner thereafter sought a subsequent hearing on that determination. The Court hereby submits this Memorandum and Opinion as dispositive of the entire case. The said opinion of March 26, 1980 is hereby amended, *nunc pro tunc*. Claimant-Owner's motion for a subsequent hearing is denied.

FINDINGS OF FACT

Plaintiff is Gulf Trading & Transportation Company, (hereafter "GT&T") a division of the Gulf Oil Corporation, a corporation incorporated under the laws of the State of Pennsylvania, with its principal place of business in Pittsburgh, Pennsylvania. The Vessel HOEGH SHIELD (hereafter "Vessel") is, and was at all material times, a vessel documented under the laws of and flying the flag of Norway and owned by A/S Alliance of Oslo, Norway, the Claimant-Owner herein.

At all material times the Vessel was under time charter to Multinational Gas & Petroleum Co., whose principal office was in London, England (hereafter referred to as "Multinational"). Under the charter agreement, Multinational agreed to provide to the Vessel all bunkers necessary while engaged under the charter to Multinational. GT&T had no actual knowledge of the provisions of the charter agreement at any relevant time.

On or about July 1, 1977, Multinational made a request to GT&T's London office to arrange for the delivery of bunkers to the vessel at Cristobal, Canal Zone, on July 4, 1977. A Bunker Nomination form was prepared by GT&T's London office and the nomination was confirmed by Gulf's Bunkering office in New York. Confirmation was then given by GT&T's London office to Multinational. On July 5, 1977, 528.27 metric tons of the intermediate fuel oil and 85.54 metric tons of marine diesel oil were delivered aboard the Vessel at Cristobal, Canal Zone, by GT&T and receipted for by the Vessel's Chief Engineer. On July 19, 1977, GT&T's Invoice Number 077-0342 in the amount of U.S. $54,357.76 was sent by GT&T-Pittsburgh to Multinational in London covering the de-

liveries made to the Vessel on July 5, 1977. The Invoice specified payment to GT&T in the United States.

GT&T's Invoice Number 077-0342 has never been paid, either in whole or in part.

Subsequent to the above-described transaction, Multinational became insolvent and a "winding up" order was entered by the High Court of Justice, Chancery Division, Companies Court (No. 003270 of 1977) in London on November 14, 1977.

On or about December 1, 1977, the Vessel arrived at the Port of Texas City, Texas, within this District. This action was commenced and a Writ of Seizure was issued by the Clerk on December 1, 1977. Prior to the arrest of the Vessel, an agreement was reached among the parties whereby GT&T agreed to refrain from arresting the Vessel and to accept in lieu of other securities a Letter of Undertaking in the amount of $60,000.00 from the Vessel's protection and indemnity underwriter, Assurance foreningen Skuld of Oslo, Norway.

There was no written bunkering contract in existence between GT&T and Multinational at any relevant time.

The Itinerary of the Vessel following the delivery of bunkers to it by GT&T in Cristobal, Canal Zone, on July 5, 1977, until the commencement of this action was as follows:

Tampico	— July 10-11, 1977
Houston, Texas	— July 13-14, 1977
Good Hope, La.	— July 15-16, 1977
Amsterdam	— August 1-27, 1977

Grangemouth	— August 28 - September 2, 1977
Swansea	— September 6-7, 1977
Texas City, Texas	— September 20-22, 1977
Galveston, Texas	— September 22, 1977
Parvoo	— October 9-10, 1977
Terneuzen	— October 13-19, 1977
Paulsboro	— October 30 - November 1, 1977
Swansea	— November 9-10, 1977
Terneuzen	— November 12-14, 1977
Houston, Texas	— November 29 - December 1, 1977

The Canal Zone, where the bunkers were delivered to the Vessel, was within the jurisdiction of the United States at all material times herein.

Credit authority was established by GT&T in behalf of Multinational through its credit department in Pittsburgh prior to the delivery of bunkers to the HOEGH SHIELD and bunkers were furnished to vessels under charter to Multinational either in Houston, Texas or Cristobal, Canal Zone, on fourteen occasions from March until August, 1977. Each of these transactions arose out of separate orders for bunkers from Multinational for delivery of bunkers to specific vessels at specific ports and were invoiced separately.

CONCLUSIONS OF LAW

This action arises under the admiralty and maritime jurisdiction of this court. 28 U.S.C. § 1333.

I.

Claimant-Owner contends that the Court's exercise of *in rem* admiralty jurisdiction over the Vessel offends the

Due Process Clause of the Fifth Amendment of the United States Constitution under the Supreme Court's decision in *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). The Court finds this contention to be without merit. The case authorities do not support and reason does not commend the extension of the rule of *Shaffer v. Heitner* to embrace an admiralty action *in rem* to enforce a maritime lien against a foreign vessel which accepted necessaries delivered within the jurisdiction of the United States.

II.

Claimant-Owner also raises the issue of whether the law of the United States, England or Norway should apply. Under the case of *Lauritzen v. Larson,* 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1954) and its progeny, it is clear that the appropriate choice of law criteria applicable to questions of admiralty and maritime law, including maritime liens, must be arrived at from weighing the significance of the connecting factors between the shipping transactions regulated and the national interest served by the assertion of authority. In this case bunker fuel was delivered to a foreign flag vessel by an American supplier within the jurisdiction of the United States. Further, the invoice issued by the supplier specified payment in the United States. Admittedly, the agreement between GT&T and Multinational, while contemplating performance within the United States, was formed in London, England. Employing the criteria applicable to a case of this nature, *See, Lauritzen v. Lauritzen, supra;* Restatement of the Law (Second) Conflict of Laws, Sections 6, 188, 191 and 251(2), the Court holds that the most significant factor presented is the fact that bunkers were furnished to the

Vessel within the jurisdiction of the United States by an American supplier. Accordingly, I hold that the admiralty and maritime law of the United States fairly applies in this case. To hold otherwise would ignore the congressional policy underlying maritime lien laws of the United States to protect American suppliers. 46 U.S.C.A. § 971 and legislative history to 1954 and 1971 amendments of the Ship Mortgage Act of 1920: House Report No. 1663, May 20, 1954, 83rd Congress, Second Session, 1954 U.S. Cong. & Adm. News 2451 and House Report No. 92-340, July 8, 1971). 1971 U.S. Cong. & Adm. News 1356. To hold otherwise would ignore overall fairness in this case.

III.

In view of the holding that American maritime law controls this case, the Court holds that a dismissal of this action under the doctrine of *forum non conveniens* would not be warranted. *Anastasiadis v. S.S. Little John,* 346 F. 2d 281, 283 (5th Cir. 1965), *reh. den.,* 347 F.2d 823, *cert. denied,* 384 U.S. 920.

IV.

Section 971 of Title 46, U.S.C.A. provides:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Generally speaking, whether supplies or services furnished to a vessel are "necessaries" as that term is used

in Section 971 "is whether the supplies or services furnished are reasonably needed in the ship's business." *Layton Industries v. Sport Fishing Cruiser Gladiator,* 263 F. Supp. 356, 360 (D. Mass. 1967). Quite clearly, the fuel used to run the Vessel's engines is reasonably needed in the Ship's business and therefore is a necessary within the meaning of Section 971. The Court therefore holds that the bunker fuel delivered by GT&T to the Vessel in the Canal Zone on July 5, 1977, constituted a necessary within the meaning of Section 971. *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.,* 310 U.S. 268, 84 L.Ed. 1197 (1940); The Stjerneborg, 106 F.2d 896 (9th Cir. 1939).

A maritime lien arises upon the furnishing of a necessary to a vessel unless it is affirmatively established that the furnishing of such necessary was done solely on personal credit. *Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co.,* 261 F.2d 861 (5th Cir. 1958); *Veverica v. Drill Barge Buccaneer No. 7,* 488 F.2d 880 (5th Cir. 1974). The furnisher of supplies to a vessel may rely on both the credit of the vessel and the personal credit of the vessel's owner or charterer without relinquishing his maritime lien in the vessel. *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920); *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co., supra; The Stjerneborg, supra; Inland Credit Corp. v. M/T Bow Egret,* 552 F.2d 1148 (5th Cir. 1977), *reh. den.,* 556 F.2d 756. While GT&T obviously relied upon the credit of the charterer Multinational in furnishing bunkers to the Vessel, there is no evidence that GT&T relied solely on the personal credit of Multinational or otherwise took any action with the purposeful intention of foregoing its maritime lien in the

vessel. *Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co., supra,* 261 F.2d at 867. Quite to the contrary, the record indicates that the transaction was carried out in such a way as to preserve GT&T's maritime lien. The Court therefore holds that GT&T acquired a maritime lien in the HOEGH SHIELD upon the delivery of bunkers to the vessel on July 5, 1977, in the Canal Zone under 46 U.S.C.A. § 971.

V.

Claimant-Owner has brought to the attention of the Court the recent case of *Senner v. M/V Acadian Valor,* D.C. E.D. La., 485 F.Supp. 287 (Jan. 25, 1980), for the proposition that Rule C of the Supplemental Rules for Certain Admiralty and Maritime claims, F.R.C.P. 28 U.S. C.A., is unconstitutional. It is not yet certain that *Senner* states the rule of decision in the Fifth Circuit. In any event it is distinguishable from instant case in that there personal jurisdiction over the Vessel also obtained.

GT&T is entitled to the entry of a decree and is hereby awarded judgment in the amount of $54,357.76 plus interest at the legal rate of six per cent per annum from July 30, 1977, to the date of the judgment.

Findings of Fact herein which are also Conclusions of Law are adopted as such and Conclusions of Law herein which are also Findings of Fact are adopted as such.

The Clerk will notify Counsel. Done in Houston, Texas on this the 12th day of August, 1980.

/s/ ALLEN B. HANNAY
United States District Judge

Opposition

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 81-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE VESSEL HOEGH SHIELD,
Etc., Et Al.,
Petitioners

v.

GULF TRADING & TRANSPORTATION
COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 81-1951

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GULF TRADING & TRANSPORTATION
COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Justices Of The Supreme Court Of The United States:

COMES NOW, Gulf Trading & Transportation Company (now known as Gulf Oil Trading Company), a division of Gulf Oil Corporation, Respondent herein (hereinafter referred to as "Gulf"), and files this, its Brief in Opposition to the Petition for Certiorari filed herein, and would show as follows:

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court below.

This is an *in rem* admiralty action to enforce a maritime lien on the vessel HOEGH SHIELD arising out of the furnishing of bunkers to the vessel in the Canal Zone on July 5, 1977. No *in personam* action is involved. The action was commenced on December 1, 1977, in the Southern District of Texas. A Writ of Seizure was issued by the Clerk but the Writ was not executed by the Marshal and the vessel was not arrested or otherwise detained. Instead a Letter of Undertaking was issued by the vessel's protection and indemnity underwriter, and pursuant thereto a claim of owner was filed on October 6, 1978 (R. 11). After discovery was completed, the case was submitted to the Trial Court on an Agreed Statement of Facts (R. 62-66). The case was bifurcated and certain threshold issues were initially submitted to the District Court for decision. On March 26, 1980, the District Court's Memorandum and Opinion on the threshold issues was filed. All issues were decided in favor of the Plaintiff (R. 109). Finally on August 12, 1980, the District Court filed its Memorandum and Opinion and entered Final Judgment awarding the Plaintiff a judgment in the amount of $54,357.76 plus interest (R. 138, 145).

The District Court's Judgment was affirmed by the United States Court of Appeals for the Fifth Circuit on October 7, 1981. *Gulf Trading & Transportation Co. v. The Vessel HOEGH SHIELD*, 658 F.2d 363 (5th Cir. 1981). The appeal was consolidated for argument with *Merchants National Bank v. Dredge Gen. G. L. Gillespie*, 663 F.2d 1338, 1982 AMC 1 (5th Cir. 1981), since

both appeals raised the question of the constitutionality of the exercise of *in rem* admiralty jurisdiction under the Due Process Clause of the Fifth Amendment to the United States Constitution. However, in this case the Fifth Circuit held that the issue of the constitutionality of seizures pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims was not raised because there was no seizure of the vessel. The Court also resolved the choice of law question in favor of the application of American law.

B. Statement of Facts.

The action was submitted to the District Court on an Agreed Statement of Fact (R. 62), a copy of which is set out in the Appendix hereto. The facts will be briefly summarized below.

The vessel HOEGH SHIELD, a Norwegian flag vessel owned by the Claimant, was at all material times under time charter to Multinational Gas & Petrochemical Co. ("Multinational") whose principal office was in London (R. 62). On or about July 1, 1977, Multinational made a request to Gulf's London office to arrange for the delivery of bunkers to the vessel at Cristobal, Canal Zone on July 4, 1977 (R. 63). The bunkers were delivered to the vessel in the Canal Zone on July 5, 1977, and receipted for by the vessel's Chief Engineer (R. 63). On July 19, 1977, Gulf issued its invoice covering the bunkers in the amount of $54,357.76 (R. 63). This invoice has never been paid (R. 63). Multinational subsequently became insolvent and is the subject of an insolvency proceeding in Great Britain.

ARGUMENT

I. Review Should Be denied On The Issue Of Whether The In Rem Admiralty Procedure Satisfies The Requirements Of Due Process Under The Fifth Amendment.

A. Petitioner has waived any objection to the Constitutionality of the In Rem Procedure.

The Petitioner asserts that it was deprived of the use of its property contrary to the due process requirements of the Fifth Amendment to the United States Constitution. In actual fact, the HOEGH SHIELD was never arrested. As the Court below held: ". . . there was no seizure, and hence no seizure without notice." *Gulf Trading & Transportation Co. v. The Vessel HOEGH SHIELD*, 658 F.2d 363, 369, (5th Cir. 1981). Upon the filing of the Complaint, a Writ of Seizure was issued by the District Clerk and placed in the hands of a Deputy Marshal for execution. At approximately the same time, the Claimant was contacted by Gulf's attorneys in New York and advised that the HOEGH SHIELD was about to be arrested. An agreement was entered into whereby the Claimant made arrangements for its protection and indemnity underwriters to issue a Letter of Undertaking satisfactory to Gulf's attorneys guaranteeing the payment of any decree that might be entered up to a stipulated amount and agreed to voluntarily file a claim of owner in return for Gulf's refraining from having the HOEGH SHIELD arrested (R. 63). Pursuant to this agreement, the Marshal was instructed not to seize the HOEGH SHIELD; the Writ of Seizure was returned unexecuted. (R. 4), and a Claim of Owner was eventually filed by the Claimant

(R. 11). It is submitted that the voluntary submission of the HOEGH SHIELD to the District Court's *in rem* jurisdiction by the Claimant constituted a waiver of whatever right the Claimant might have had to challenge the constitutionality of the *in rem* admiralty procedure if the seizure had actually taken place. *See, D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), and that as a result the Court below was correct in holding that the issue of the constitutionality of Rule C was not raised by the facts of this case.

B. There is no conflict between the Circuits.

Both the Fourth and Fifth Circuits have upheld the constitutionality of the *in rem* admiralty procedures. *Amstar Corp. v. S.S. ALEXANDROS T*, 664 F.2d 904, 1981 AMC 2697 (4th Cir. 1981); *Merchants National Bank v. Dredge Gen. G. L. Gillespie, supra.* The Petitioner, nevertheless, attempts to create a split of authority among the circuits using district court decisions. Three decisions are cited as holding that the prejudgment seizure procedures of Rule C are unconstitutional. *Karl Senner, Inc. v. The M/V Acadian Valor*, 485 F.Supp. 287, 1980 AMC 1 (E.D. La. 1980), *appeal dism'd* (No. 80-3114, 5th Cir.); *P. C. International, Inc. v. Vessel Susan*, 1980 AMC 2062 (S.D. Fla., 1980); *Alaska Pipeline Service Co. v. The Bay Ridge*, Civ. No. 80-147 (D. Alaska, March 16, 1981). The *Karl Senner* decision has in effect been overruled by the *General Gillespie, supra.* The decision in *P. C. International, Inc. v. Vessel Susan, supra,* was decided while Florida was still part of the Fifth Circuit and must be considered of doubtful authority in light of the *General Gillespie.* As a result, the Petitioner's argu-

ment that there is a conflict of authority must rest on one unreported district court decision.[1]

While there can be no doubt that the issue of the constitutionality of the *in rem* admiralty procedures raise an "important question of federal law," there is no need for the issue to be resolved by this Court for the simple reason that the issue is being uniformly resolved by the lower courts consistent with the applicable requirements of the Due Process Clause and the existing practices set out in the Supplemental Admiralty Rules.

C. The in rem admiralty procedure satifies the Due Process Requirements of Notice and Hearing.

The Petitioners argue that the *in rem* procedure set out in the Supplemental Admiralty Rules fail to measure up to the due process notice and hearing requirements first enunciated in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972) and their progeny. However, when the nature of the *in rem* jurisdiction and its commercial context are considered, it becomes clear that the *Sniadach/ Fuentes* standards do not apply and that the procedures set out in Rule C meet the requirements of due process.

---

1. Petitioner cites two cases dealing with the constitutionality of the admiralty writ of foreign attachment under the procedures set out in the Supplemental Admiralty Rules. *Grand Bahamas Petroleum Co.. Ltd. v. Canadian Transportation*, 450 F.Supp. 447, 458 (W.D. Wash. 1978); *Cook Industries, Inc. v. Tokyo Marine Company Limited*, 1978 AMC 1979 (D. Alaska 1978). There is a clear distinction between the *in rem* admiralty jurisdiction and the *quasi in rem* proceedings traditionally available in admiralty practice, under Rule B of the Supplemental Rules. *See, Merchants National Bank v. Gen. G. L. Gillespie, supra*, 1982 AMC at 20. Suffice it to say that this is a pure *in rem* case and that Rule B is in no way involved.

The admiralty law has long recognized a unique right of action *in rem* against a vessel (or in certain instances a vessel's cargo or freight) entirely independent and distinct from an action *in personam* against a vessel's owner or operator. In such *in rem* actions, the vessel is treated as a legal entity unto itself. *See, generally,* Gilmore & Black, *The Law of Admiralty* (2nd ed. 1974) § 9-3, *et seq.*, p. 589. When such a right of action arises, the claimant is said to have acquired a maritime lien in the vessel.[2] A maritime lien, however, is not a lien in the common law sense, but rather constitutes a substantive property right in the vessel. *The John Stevens,* 170 U.S. 113, 18 S.Ct. 544, 42 L.Ed. 969 (1898). Gilmore and Black, *supra,* § 9-1, p. 586.

The maritime lien and the *in rem* jurisdiction are correlative. The property right conferred by a maritime lien is the right to have the vessel condemned and sold to satisfy the claim out of which the lien arises. *The Rock Island Bridge,* 73 U.S. 213, 215, 18 L.Ed. 753 (1867). A maritime lien can be enforced *only* by invoking the *in rem* procedures set out in the Supplemental Rules. *Associated Metals & Minerals Corp. v. S.S. Portoria,* 484 F.2d 460, 1973 AMC 2095 (5th Cir. 1973); *Johnson*

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2. Maritime liens arise out of certain well-defined maritime claims: seamen's wage claims, *The John Stevens, supra,* 170 U.S. 113, 119, 18 S.Ct. 544, 42 L.Ed. 969 (1898); salvage, *The Sabine,* 101 U.S. 384, 25 L.Ed. 982 (1880); torts involving a vessel, *The John Stevens, supra;* general average, *See, Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.,* 274 F.Supp. 884, 1967 AMC 1474 (D. Md. 1967); preferred ship's mortgages, 46 U.S.C. § 911, *et seq.* supplies and repairs furnished to vessels, 46 U.S.C. § 971; towage, wharfage, pilotage, stevedoring, etc., 46 U.S.C. § 971; cargo claims; claims arising out of the breach of charter parties, see *The Oceano,* 148 F. 131, 133 (S.D. N.Y. 1906); *See generally,* Gilmore & Black, *supra,* § 9-20 for the categorizing of the claims that give rise to a maritime claim.

v. Oil Transport Company, 440 F.2d 109, 115 n.6 (5th Cir. 1970), *cert. den.*, 404 U.S. 868; *Dow Chemical Company v. Barge UM-23B*, 424 F.2d 307, 311 (5th Cir. 1970). It is this relationship between the maritime lien and the arrest of the vessel that makes the *in rem* jurisdiction of admiralty unique. Arrest under Supplemental Rule C is the *exclusive* method for perfecting and enforcing a maritime lien. As a practical matter, without the *in rem* procedure of Rule C there can be no maritime lien. *See*, Hough, *Admiralty Jurisdiction—of Late Years*, 37 Harv. L. Rev. 529, 541 (1924).

In many instances, the circumstances giving rise to a maritime lien do not give rise to any similar *in personam* claim against the vessel owner or operator. For instance, if a ship is involved in a collision as a result of the negligence of a compulsory pilot, the owner of the vessel cannot be held personally liable, but the vessel can be held liable *in rem*. *The China*, 74 U.S. (7 Wall) 53, 19 L.Ed. 166 (1869). In an action for damage to cargo where the contract of carriage is between the shipper and the charterer of the vessel, the owner of the vessel cannot be held liable *in personam*, but the vessel can be held liable *in rem*. *Associated Metals & Minerals Corp. v. S.S. Portoria, supra.* Such is the situation faced by Gulf in this case. It delivered bunkers to the vessel pursuant to a contract with its charterer. The charterer is now insolvent and the owner, because it was not a party to the bunker agreement, cannot be held personally liable for the purchase price of fuel. Without a way to enforce its statutorily created maritime lien, Gulf would be left without a remedy. 46 U.S.C. § 971.

None of the cases relied on by the Petitioner deal with the type of *in rem* action that is available under the

admiralty law. *Sniadach v. Family Finance Corp., supra,* involved an *in personam* suit to recover under a promissory note in which a prejudgment garnishment of the defendant's wages was obtained. *Fuentes v. Shevin, supra,* involved *in personam* claims to recover amounts owed under personal property sales contracts in which replevin of the property in question was sought. *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974), also involved an *in personam* action to collect a commercial debt in which a prejudgment garnishment of a bank account was obtained.

In none of these cases was the prejudgment seizure of property necessary to the commencement or successful prosecution of the cause of action. Such is not the case, however, in an *in rem* admiralty action. Under the Supplemental Rules the arrest of the vessel is the equivalent of personal service. Without the execution of the warrant for the arrest of the vessel, the district court cannot acquire jurisdiction over the vessel and cannot enforce a maritime lien. Without the *in rem* admiralty procedure all maritime liens, whether they are creatures of statute, such as a preferred ship mortgage, or the general maritime law as in tort situations, are unenforceable nullities.

Quite clearly, the due process standards applicable to *in rem* admiralty procedures are and must be different from the standards which apply to cases where the attachment of property is merely ancillary to a subsisting *in personam* cause of action. The controlling cases recognize as much. In upholding the constitutionality of the seizure procedure under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 334, which provided for seizure following as closely as possible the procedure in admiralty, the

Court held in *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950):

> When libels are filed the owner has an opportunity to appear as a claimant and to have a full hearing before the court (footnote omitted). This hearing, we conclude, satisfies the requirements of due process. *Id.* at 598.
>
> . . . it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination. *Id.* at 599.

Significantly, the Court relied on the *Ewing* case to hold in *Mitchell v. W. T. Grant Co., supra,* 416 U.S. at 610, that a pre-seizure hearing was not required by the Due Process Clause of the Fourteenth Amendment. *See also, Phillips v. Commissioner,* 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931). More recently, the Fourth Circuit in *U.S. v. Articles of Hazardous Substance,* 588 F.2d 39 (4th Cir. 1978), held the procedures set out in Supplemental Rule C met the requirements of due process when followed in connection with the seizure of clothing under the Federal Hazardous Substances Act, as amended, 15 U.S.C. § 1261, *et seq.*, relying on *Ewing* as controlling authority. The Court concluded that "the Commissioners' adherence to the Admiralty Rules provided sufficient probable cause for the issuance of the warrant of seizure in this case." 588 F.2d at 43.

Supplemental Rule C(4) provides that execution of the warrant of arrest constitutes the requisite notice of the commencement of the action. The same act of exe-

cution has the effect of detaining the vessel in port under Supplemental Rule E(4)(b). As a practical matter additional notice cannot be required. Modern commercial vessels typically remain in port only as long as is necessary to load and discharge their cargo, attend to repairs, bunker and the like. Moreover, in the case of tankers and automated container, lash and Ro/Ro vessels, the vessel's time in port is often limited to a few hours. If the first effect of an action *in rem* is not to detain such vessels at a fixed location, it is doubtful that any maritime lien rights can ever be perfected. Also, there is the difficult question as to whom and in what manner notice of the commencement of an *in rem* action is to be given if not to the vessel and those in actual possession of the vessel. Often the identities of the parties actually at interest in the vessel are unknown, and if known are most likely to be not readily available. The same difficulties make any consideration of an adversarial pre-seizure hearing impractical. Following the arrest of a vessel, there are a multitude of procedural devices available under the Federal Rules to enable aggrieved parties to promptly test the validity of the seizure, either before or after the posting of security, including motions under Rule 12 and summary judgment under Rule 56.

D. The In Rem Admiralty Procedure meets the Due Process Requirements of Shaffer v. Heitner.

The Petitioner also attacks the constitutionality of the District Court's exercise of *in rem* admiralty jurisdiction on the basis of the due process requirements of minimum contacts set out in the decision of *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). However, an analysis of the *Shaffer v. Heitner* decision

makes it clear that the type of true *in rem* action which is presented here was to be left undisturbed. *Shaffer* recognized three categories of what were broadly referred to as "in rem actions" 433 U.S. at 199, n.17:

1. True *in rem* actions, which "affects the interests of all persons in designated property."
2. *Quasi in rem* actions where "the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the non-existence of similar interests of particular persons."
3. *Quasi in rem* actions where "the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him."

The holding in *Shaffer* was limited to *quasi in rem* actions of the third category:

> This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. *For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant,*[24] it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest.
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> 24. This category includes true in rem actions and the first type of quasi in rem proceedings. See n.17, supra.
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> 433 U.S. at 207, 208.

Since this case involves a true *in rem* action, where a claim to or involving the property itself is the source of the underlying controversy, *Shaffer* is not applicable. Thus, mere presence of the vessel within the jurisdiction is a sufficient contact to permit exercise of jurisdiction over it. Further, this case does not involve the problem of balancing the reach of competing state jurisdictions in a federal system, but involves the reach of the admiralty and maritime jurisdiction of the United States in an international setting. As was noted in a different context by Justice Stevens, concurring in *Shaffer*, different considerations apply in the area of international law. 433 U.S. at 218. *See, Amoco Overseas Oil Co. v. Campagnie Nationale Algerienne,* 605 F.2d 648 (2nd Cir. 1979); Bohmann, "*Applicability of Shaffer to Admiralty In Rem Jurisdiction*", 53 Tulane L. Rev. 135, 146 (1978).

II. Review Should Be Denied On The Choice Of Law Issue.

The Court below held that an American supplier furnishing goods, services or necessaries to a foreign vessel in an American port obtains a maritime lien under Section 971 of Title 46, U.S.C., and that in such a situation the maritime law of the United States applies generally. The Petitioner takes the position that English law should have been applied because the contract between Gulf and the vessel's defunct charterer for the purchase of the bunkers was entered into in London. The Court of Appeals, however, correctly noted that the maritime lien asserted here arises by operation of law rather than from the contract between Gulf and the charterer, citing *Rainbow Line, Inc. v. M/V Tequilla,* 480 F.2d 1024, 1026 (2nd Cir. 1973), 1973 AMC 1431, 1433. Following the general

approach instituted by *Lauritzen v. Larson,* 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), the Court looked to the choice of law principles set forth in Section 6 of Restatement (Second) of Conflicts of Law. It found that the application of American law was mandated by many factors, including the relevant policies of the forum as evidenced by the legislative intent underlying the 1971 amendments to 46 U.S.C. § 971, *Atlantic & Gulf Stevedores, Inc. v. M/V Grand Loyalty,* 608 F.2d 197, 201 (5th Cir. 1979); the predictability of result; the protection of justified expectations; and the overwhelming interest of the United States in protecting American suppliers.

The decision below, while relying on broad choice of law principles, is entirely consistent with the long established principle of American maritime law that whether a maritime lien "exists for supplies or necessaries furnished to foreign vessels, depends on the law of the place where the supplies or necessaries were furnished, and not on the law of the country to which the vessel belongs." *The Kaiser Wilhelm II,* (D. N.J. 1916) 230 F. 717, 719 *rev'd* 246 F. 786 (3rd Cir. 1917) (*citing The Scotia* (S.D. N.Y. 1888) 35 F. 907); *Accord: The Woudrichem* (E.D. N.Y. 1921) 278 F. 568; *See Meridian Trading Corp. v. S.S. Denton,* 1960 AMC 2264, 2270 (S.D. Tex. 1960, Commissioner's Report, exceptions denied Nov. 23, 1960 [Connally J. A.D. No. 2111, Galveston Division).

The holding of the Court below on the choice of law issue is correct and is not in conflict with any applicable cases, and should be left undisturbed by this Court.

CONCLUSION

For the reasons set forth in this Brief, the Petition for a Writ of Certiorari filed in behalf of the HOEGH SHIELD should be denied.

This _____ day of May, 1982.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon Robert M. Julian, Esq. of Julian & Seele, 306 Hilshire Building, 1003 Wirt Road, Houston, Texas 77055, the attorney for the Petitioner herein, by placing the same in the United States Certified Mail, Return Receipt Requested, in a properly addressed package with adequate postage thereon, on this, the _____ day of May, 1982.

JAMES PATRICK COONEY

Appendix

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. No. H-77-1976

GULF TRADING & TRANSPORATION COMPANY

v.

THE VESSEL HOEGH SHIELD,
Her Engines, Tackle and Appurtenances, *In Rem*

AGREED STATEMENT OF FACTS

To The Honorable Judge Of Said Court:

COME NOW Gulf Trading & Transportation Co., Plaintiff herein, and A/S Alliance, Claimant of the Vessel HOEGH SHIELD, and stipulate to the following facts for purposes of the trial of the threshold issues presented by this action:

1. A/S Alliance of Oslo, Norway is the owner of the Vessel HOEGH SHIELD, a Vessel documented under the laws of and flying the flag of Norway (hereafter referred to as "the Vessel").

2. The Gulf Trading & Transportation Company (hereafter "GT&T") is a division of the Gulf Oil Corporation, a corporation incorporated under the laws of Pennsylvania, with its principal place of business in Pittsburg, Pennsylvania.

3. At all material times the Vessel was under time charter to Multinational Gas & Petrochemical Co., whose principal office was in London, England (hereafter referred to as "Multinational"). Under the charter agreement, Multinational agreed to provide to the Vessel all bunkers necessary while engaged under the charter to Multinational. GT&T had no actual knowledge of the provisions of the charter agreement at any relevant time.

4. On or about July 1, 1977, Multinational made a request to GT&T's London office to arrange for the delivery of bunkers to the Vessel at Cristobal, Canal Zone on July 4, 1977.

5. On July 5, 1977, 528.27 metric tons of intermediate fuel oil and 85.54 metric tons of marine diesel oil were delivered aboard the Vessel at Cristobal, Canal Zone by GT&T and receipted for by the Vessel's Chief Engineer.

6. On July 19, 1977, GT&T's Invoice Number 077-0342 in the amount of U.S. $54,357.76 was sent by GT&T-Pittsburg to Multinational in London covering the deliveries made to the Vessel on July 5, 1977.

7. GT&T's Invoice Number 077-0342 has never been paid, either in whole or in part.

8. Subsequent to the above-described transaction, Multinational became insolvent and a "winding up" order was entered by the High Court of Justice, Chancery Division, Companies Court (No. 003270 of 1977) in London on November 14, 1977.

9. On or about December 1, 1977, the Vessel arrived at the Port of Texas City, Texas, within this District.

This action was commenced and a Writ of Seizure was issued by the Clerk on December 1, 1977. Prior to the arrest of the Vessel, an agreement was reached among the parties whereby GT&T agreed to refrain from arresting the Vessel and to accept in lieu of other securities a Letter of Undertaking in the amount of $60,000.00 from the Vessel's protection and indemnity underwriter, Assuranceforeingen Skuld of Oslo, Norway.

10. There was no written bunkering contract in existence between GT&T and Multinational at any relevant time.

11. The itinerary of the Vessel following the delivery of bunkers to it by GT&T in Cristobal, Canal Zone on July 5, 1977, until the commencement of this action was as follows:

Tampico	— July 10-11, 1977
Houston, Texas	— July 13-14, 1977
Good Hope, Louisiana	— July 15-16, 1977
Amsterdam	— August 1-27, 1977
Grangemouth	— August 28 - September 2, 1977
Swansea	— September 6-7, 1977
Texas City, Texas	— September 20-22, 1977
Galveston, Texas	— September 22, 1977
Parvoo	— October 9-10, 1977
Terneuzen	— October 13-19, 1977
Paulsboro	— October 30 - November 1, 1977
Swansea	— November 9-10, 1977
Terneuzen	— November 12-14, 1977
Houston, Texas	— November 29 - December 1, 1977

The parties specifically reserve the right to object to the relevancy of the information contained in this Stipulation No. 11.

12. The Credit File maintained by GT&T on Multinational and produced by GT&T pursuant to the Court's Order of June 16, 1979, is authentic and is admissible for use in this action only under Rule 803(6) of the Federal Rules of Evidence. It is understood that the Credit File contains confidential information regarding GT&T credit practices and that these practices will not be publicly reported or divulged except as may be relevant to the resolution of this action. Either party may refer to and make arguments based on the documents contained in the Credit File, with all objections as to the relevancy reserved by the parties.

13. The record before the Court for the determination of the threshold issues presented in this action shall include the following:

A. This Stipulation.

B. The Credit File maintained by GT&T on Multinational.

C. The deposition of Keith I. Cushing obtained on May 9, 1979, and the Exhibits thereto.

D. Plaintiff's Response to Defendant's Requests for Production of Documents and Things filed March 17, 1979.

E. Plaintiff's Requests for Admissions filed March 27, 1979, which are deemed admitted under Rule 36 of the Federal Rules of Procedure.

F. Plaintiff's Answers to Defendant's Interrogatories and Supplemental Requests For Production of Documents and Things.

G. The parties shall have the right of supplementing the record herein with affidavits, with both parties reserving all objections to any affidavits so filed.

14. Claimant intends to raise the following legal issues, among others in the trial of this action.

A. Should the Court decline to accept jurisdiction in this case under the doctrine of *forum non conveniens?*

B. Does the Court have jurisdiction to enforce *in rem* rights in the Vessel under *Shaffer v. Heitner,* 433 U.S. 186?

C. Should the substantive law of England, Norway or the United States apply to this action under applicable *choice of law* criteria? Plaintiff does not stipulate that the above legal issues are properly pleaded or are properly before the Court.

15. If the Court retains jurisdiction or for any reason wishes proof of foreign law, either party may produce such proof by oral testimony, deposition or written opinions submitted by competent authority on such law subject to rebuttal by the other party.

16. The Court is to determine such other or further proceeding, if any, as might be necessary for a final determination on the merits.

The foregoing Agreed Statement of Facts entered into by the parties hereto, acting through their counsel of record, this 28th day of December, 1979.

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